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Supreme Court, U.S.
FILED

No. 071297

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In The

Supreme Court of the United States

BRENT POLL,

Petitioner,

vs.

HENRY M. PAULSON, JR., Secretary,
United States Department of Treasury, et al.,

Respondents.

On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Tenth Circuit

PETITION FOR A WRIT OF CERTIORARI

BRENT POLL
7605 South 1375 East
South Weber, Utah 84405
(801) 479-3786
pro se
(Attorney of record died 11-12-07)

QUESTIONS PRESENTED

1. Whether Federal Agencies are mandated to adhere to their own adverse action regulations as well as the Federal laws and regulations from which the Agency regulations were derived.

2. Whether Federal agencies must consider the answers provided by Federal employees to proposed adverse actions against them, and to eradicate every form of discrimination found therein. Whether Agencies are required to take disciplinary actions against employees who engage in those discriminatory practices.

3. Whether sanctions are warranted against the Petitioner or his now-deceased attorney regarding the manner in which the above two questions were pursued through the Federal judicial system.

LIST OF PARTIES

All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition follows:

HENRY M. PAULSON, JR., Secretary, United States Department of the Treasury, PAUL H. O'NEIL, former Secretary, United States Department of Treasury; JOHN W. SNOW, former Secretary, United States Department of Treasury, OFFICE OF SPECIAL COUNSEL, OFFICE OF PERSONNEL MANAGEMENT; INTERNAL REVENUE SERVICE MERIT SYSTEMS PROTECTION BOARD; UNITED STATES EQUAL OPPORTUNITY COMMISSION; JAMES SCOTT, Chief of the File and Information Branch for OPM; RONNIE BLUMENTHAL, Director of the Office of Federal Operations for the EEOC; UNNAMED EEOC COMMISSIONERS; CARLTON M. HADDEN; DAVID A. MADER; DAVID J. MUNGO; ERIN MCDONNELL; JAMES SCOTT; LOIS HOFFMAN; MAUREEN BASS; PAUL E. TRAYERS; ROBERT E. TAYLOR; AND WILLIAM E. REUKAUF; and JOHN DOES 1-5.

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OPINIONS BELOW

The opinions of the lower courts were unpublished.

JURISDICTION

The court of appeals decision was filed on 18 Oct. 2007. A timely petition for rehearing was denied on 14 Jan. 2008 (App. A and C). This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

"The Supremacy clause of the Constitution provides in relevant part: [T]he laws of the United States * * * shall be the supreme law of the land * * * any thing in the constitution or laws of any state to the contrary notwithstanding." U.S. Constitution, Article VI, cl. 2.

Statutory provisions include Section 704(a) of the Civil Rights Act of 1964, 5 U.S.C. § 7501-7504, 5 U.S.C. § 7513(a), 5 U.S.C. § 2302(b) and the Federal and agency regulations derived from those provisions.

STATEMENT OF THE CASE

This case raises important and recurring questions relating to Federal officials who must decide: (1) whether proposed adverse actions satisfy the statutory prerequisites of 5 U.S.C. § 7513(a) in that they are initiated. . . . "only for such cause as will promote the efficiency of the service" and 5 U.S.C. § 2302(b)(10) which limits them. . . . only to instances when an adverse "affect on the performance of the employee or applicant or the performance of others" can be shown; (2) when an Agency must consider whether an employee has been retaliated against in violation of Section 704(a) Title VII of the Civil Rights Act of 1964.

The Petitioner contends that only the Agency's designated proposing official has absolute discretion to decide the first question posed above. One answer to the second question, per 5 C.F.R. § 752.404(f), is that the Agency "shall consider any answer of the employee" as provided in response to a proposed adverse action. The Petitioner's answer to the designated oral-reply officer was that the proposed action against him was the result of a retaliation covered under Section 704(a) of Title VII of the Civil Rights Act of 1964 as well documented in the case record.

Albert Przecha was designated by the Agency to serve as both the proposing official and oral-reply officer in this case. Accordingly, he was the sole authority to decide the propriety of the proposed

adverse action and the Agency's only recipient of the Petitioner's answer/charge of retaliation.

The circuit court agreed "with the district court that the evidence supplied by Mr. Przecha was simply that – a piece of evidence – and not the basis for bringing an entirely new proceeding." (circuit court "c.c." Opinion and Judgment "OJ", p. 7).

The disparity between the Petitioner's contentions, concerning Przecha, and the conclusion by the circuit court is the basis for this petition.

REASONS FOR GRANTING THE PETITION

A. There is a direct and important conflict between the decision of the circuit court and a decision of the Supreme Court. Supreme Court Rule 10(c).

This Court held in *Service vs. Dulles*, 354 U.S. 363, 388, 77 S.Ct. 1152 (1957) that agencies could not, "so long as the regulations remain unchanged, proceed without regard to them." The circuit court was aware of the decision of this Court as shown on pages 1 and 4 of the Petition for Rehearing, but still held that Przecha's input was "simply that . . . a piece of evidence . . . and not the basis for bringing an entirely new proceeding," (c.c. OJ p. 7). This decision by the circuit court showed a failure to show due "regard" for the agency's regulations.

Compliance with those regulations routinely required withdrawal of the Petitioner's proposed

termination. Every subsequent action by the Respondents after failure to withdraw this proposal involved coverups and managerial misconduct at the highest levels of the Department of the Treasury. Contrary to the lower courts' decisions, Przecha's declaration is a cause of action for a new proceeding.

B. There is a direct and important conflict between the lower courts' decision and another rendered by the Court of Appeals for the Federal Circuit. Rule 10a.

Loui vs. Merit Systems Protection Board, 25 F.3d 1011 (C.A. Fed., 1994) "underscores the importance of Section 752.404(f)" in appeal processes regarding adverse actions. Failure to comply with 5 C.F.R. § 752.404(f) was sufficient to warrant reversal "on the ground that it is not in accordance with law."

In this case, the lower courts held that the Petitioner's answer to Albert Przecha, the Respondents' oral-reply officer in accord with 5 C.F.R. § 752.404(f), was "simply that – a piece of evidence – and not the basis for bringing an entirely new proceeding," (c.c. OJ p. 7). This decision gave no "importance" to Section 752.404(f), allowed the Respondents to misrepresent that Przecha did not conduct a hearing or receive an answer from the Petitioner under this regulation; and dismissed the Petitioner's right under this regulation to answer the proposed adverse action as shown below in item C. (1) and C. (2).

C. (1) There are direct and important differences between the decisions of the lower courts and Federal and agency regulations which define the procedures required for taking adverse actions against Federal employees. Departure from those authorities at the highest levels of the Department of the Treasury, and collusion with other Federal agencies in this process, is a problem of national interest and worthy of the attention of this Court. Rule 10(c).

. . . . IRM 6.752.2, prepared in accord with 5 U.S.C. § 7501-7504, 29 C.F.R. part 1614, 5 C.F.R. § 752 subparts C & D, 5 U.S.C. §§ 7114(a)(5) and 7121(b)(3), defines the responsibilities of those, such as Albert Przecha, who serve as proposing officials and oral-reply officers.

. . . . In accord with IRM 6.752.2.7.5(9)(c), the proposing official is authorized, on his/her own initiative, to withdraw the adverse action he/she proposes "at any time" prior to the decision by the deciding official. This unfettered power, coupled with the requirement that an adverse action must satisfy the standard for action per 5 U.S.C. § 7513(a) and 5 C.F.R. § 752.403(a)(b), requires withdrawal of all proposed adverse actions which fail to meet those standards. The standards are not satisfied when the proposing official/oral-reply officer states that a directed reassignment "is for the express purpose of firing" the person so reassigned (c.c. App. p. 338-340). Such a

reassignment is outside agency discretion as shown in Respondents' submission to the circuit court (c.c. App. p. 72-73).

. . . . Oral-reply officers [per 5 C.F.R. § 752.404(c)(2)] are mandated to hear the oral answer from the candidate for adverse action. He/she must have the authority to take or recommend a final decision.

. . . . The other agency official involved in adverse actions is the deciding official, but unlike the proposing official and oral-reply officer, the deciding official is precluded from influencing a proposed adverse action "in any manner" [per IRM 6.752.2.6(6)], and must have "taken no part in influencing the proposal," per IRM 6.752.2.7.6(1).

Albert Przecha served as both the Respondents' proposing official and oral-reply officer for Petitioner's termination. As such, he had sole discretion on the subject. No other individual was so empowered. This was the case during 1983 when he found no "legitimate management reason" for the directed reassignment, as required in *McClelland vs. Andrus*, 606 F.2d 1278, 1291 (D.C. Cir. 1979) and as shown in the record at c.c. App. p. 138, 140-141. If not unduly influenced by his superiors, Przecha's declaration shows he should have routinely withdrawn, per IRM 6.752.2.7.5(9)(c), the Petitioner's proposed 1983 termination on his own initiative. This undue influence was contrary to the basic entitlements afforded the Petitioner under 5 U.S.C. § 7513(a). This was also contrary to the Standard for Action shown in 5 C.F.R.

§ 752.403(a)(b) and contradicts adverse-action procedures outlined in 5 C.F.R. § 752.404.

Przecha's 1984 statement (the basis for this case) showed Petitioner's entire 1982/1983 adverse action proceeding was compromised by the Respondents. It is irrefutable proof of a wrongful reassignment followed by a wrongful termination. There was no legitimate means for the agency to finalize Poll's termination when its designated proposing official/ oral-reply officer declares that the stated reason for the reassignment to Fresno was contrary to agency discretion. Everything subsequent to Przecha's determination (i.e., the termination, the Merit System Protection Board "MSPB" hearing and the decades of agency coverups) were an unnecessary waste of resources for all involved. Przecha's "new" 1984 statement reflects the agency's failure to adhere to its own adverse-action regulations as well as the Federal laws and regulations from which the agency's regulations were derived.

This is so serious that all those involved in bypassing those procedures through false actions/ statements in an official agency process, as defined in C.F.R. § 752.404 and IRM 6.752.2, could be fired for cause for just one offense in accord with IRM 6.751.1.16.2. They could be disciplined under 29 C.F.R. § 1614.102(a)(6) for retaliations they perpetuated. This seriousness helps explain why the Respondents worked for decades to coverup the matter.

Przecha's 1984 statement also alludes (viewed with feedback through the oral reply – c.c. App.

p. 138, 140-141) to the retaliations and misrepresentations which Appellant alleged as part of his oral reply. The Respondents are mandated to consider Petitioner's answers in accord with 5 C.F.R. § 752.404(f), but they failed to do so by suppressing/ignoring both the agency's proposing official/oral-reply officer and the answers supplied by the Petitioner. As shown in district court case #1:06CV00144TC-BCW (and page 5 of the petition for rehearing at the circuit court), the Respondents denied that an oral-reply was ever conducted while the Petitioner retains the audio tape of the most formal parts of the hearing which disproves this false claim.

The gross understatement of the importance of the Przecha evidence originated with the district court (c.c. App. p. 445-447) and was then endorsed by the circuit court. The circuit court's conclusion contradicts the heavy importance of the Przecha evidence which was a rare point of agreement between the two parties. It was so significant to the Respondents that they cited settlement of it as the first and primary basis for their Motion for Summary Judgment (c.c. App. p. 10, 18 last para). They later withdrew this strong but false claim in view of about 130 pages of Petitioner's rebuttal (c.c. App. p. 173-180, 194-322). The Przecha evidence was so significant to the Petitioner that it could have well served as his own basis for Motion for Summary Judgment as shown in c.c. App. p. 189.

The circuit court's error in this instance was also contrary to its own standards for reviewing Motions

for Summary Judgment wherein it holds that "it will draw reasonable inferences in the light most favorable to the non-moving party," and not allow Summary Judgment when there is a "genuine issue as to any material fact." See *Jones vs. United Parcel Service, Inc.*, 502 F.3d 1176, Nos. 06-3088, 06-3095, 2007 WL 2677141 at *4 (10th Cir.). See *Wells vs. Shalala,* 288 F.3d 1137, 1140 (10th Cir. 2000).

This error is of national importance because it is contrary to Federal and agency regulations which govern how and by whom decisions are made regarding proposed adverse actions against Federal employees. The lower courts' decisions are apparently "out of line with the authorities." See *Braen vs. Pfeifer Transportation Co.*, 361 U.S. 129, 130 (1959). Those errors create a basis for confusion (for the Department of the Treasury and others) over accountability for decision-making regarding adverse actions.

C. (2) It is of national interest that Federal employees not suffer retaliations for reporting gross mismanagement and/or acts of discrimination as defined in 5 U.S.C. § 2302(b) and Section 704(a) of the Civil Rights Act of 1964. When charges of retaliation are not resolved voluntarily by the agencies, employees must rely on Federal courts to scrutinize those charges in accord with the controlling authorities. Such scrutiny was absent with the lower courts for this case. This absence raises an important question about the commitment of the Federal judicial system to protect Federal employees from retaliation. Supreme Court Rule 10(c).

The transcript of the hearing at the district court showed that, because of the lengthy procedural and logistical problems, the court indicated to Petitioner's attorney that "you have to talk me out of just throwing this out right now and doing everyone a favor and getting rid of it" (c.c. App. at lines 9-12 of page 439). Such "a favor" offers no solace to one retaliated against by his/her Federal employer. This is especially so regarding an employer who has worked successfully for decades through coverups/delays/misdirections to avoid the accountability and discipline mandated by 29 C.F.R. § 1614.102(a)(2)(3)(6) for initiating such retaliations. Consistent with "getting rid" of this case through summary judgment, the lower courts incorrectly held that:

(a) The Petitioner waited for fifteen years to initiate "another individual complaint of discrimination" (c.c. OJ p. 3 para 3).

This is contradicted in Respondents' own submission to the circuit court (c.c. App. p. 58 lines 18-21). This shows that the Petitioner first raised the 1984 Przecha declaration to an EEO counselor well within 45 days of first learning of it in accord with 29 C.F.R. § 1614.105(a)(1). The agency EEO Director is mandated "for assuring that individual complaints are fairly and thoroughly investigated and that a final action is taken in a timely manner" per 29 C.F.R. § 1614.102(c)(5). The agency is further mandated to provide "prompt and impartial" processing of complaints [per 29 C.F.R. § 1614.102(a)(2)]. A complainant's role in the EEO complaint process is a

reactionary one. He/she must await receipt of a notice as required by 29 C.F.R. § 1614.105(d)(e) or (f) before filing a formal individual complaint in accord with 29 C.F.R. § 1614.106(b). In this case, the Respondents failed to ever provide the above notice (c.c. App. p. 177, para 1).

The Respondents engaged instead in an extensive coverup. From 1985 to 1987 they conspired with NACI/OPM to withhold the needed tangible evidence of the Przecha statement by saying it did not exist (c.c. App. pgs. 173-180 & 323-343). From 1987 to the footnote in its 2005 reply (c.c. App. p. 405) the Respondents claimed to have resolved the Przecha evidence through a 1987 settlement agreement. This false claim of settling the Przecha matter in 1987 was disproved by about 130 pages of Petitioner's rebuttal (cc. App. p. 173-180, 194-322).

Belated inferences that Petitioner did not contact a counselor within 45 days, are disingenuous. The Respondents insisted for almost two decades that they had resolved the Przecha evidence as part of a 1987 EEO settlement (c.c. App. p. 10, 18 last para). This was the first and paramount reason for their Motion for Summary Judgment. It was a justification for their 2002 "safe harbor" letter to Petitioner's now departed attorney. To infer that they were not aware of Petitioner's Przecha-related EEO complaint, throughout the decades they were claiming to have settled it, is not credible. It was instead an intentional misrepresentation to the circuit court which

could warrant sanctions against them (c.c. App. p. 174, para 3).

(b) Petitioner waived "any discrimination claims" against the agency and "his whistleblower claim ... was raised for the first time in district court" (c.c. OJ p. 5, para 2).

The lower courts were incorrect in both instances. Petitioner elected to file his employment-related complaints with the agency through its mixed-case EEO processes. This is reflected in the circuit court's App. p. 136-137, 183, 344-370 which shows that Petitioner's first EEO/EEOC case was worked to the point of settlement by the Central Regional Office of the IRS. The settlement was then quashed by the office of the Regional Commissioner of the Western Region (the ADO's office). Background to this case shows the Office of Special Counsel formally deferred its whistleblower/retaliation case to this open EEO complaint on 11 May 1982. The EEO complaint was initiated on 17 Mar. 1982 (c.c. App. p. 364-370) and the counselor's report was finalized on 30 Mar. 1982.

In accord with the plain language of 29 C.F.R. § 1614.302(b) "whatever is filed first shall be considered an election to proceed in that forum." The agency, in accord with 29 C.F.R. § 1614.302, is mandated to advise complainants regarding their rights and responsibilities in mixed-case complaints. The assumption is that such advice will be accurate (c.c. App. p. 139, last para).

The Agency unilaterally closed Respondent's open EEO/EEOC case cited above against his wishes after his termination, and directed that his case must be processed through the MSPB. This, it claimed, was because the Petitioner had alleged whistle-blowing and other Prohibited Personnel Practices (PPPs), as well as retaliation for representing an African-American with an EEO case, as causal factors affecting his complaint (c.c. App. p. 183-184).

The Petitioner was only involved with the MSPB (after his 1982 election to pursue the EEO option) as advised by the Agency. This appears as an intended part of the agency's coverup/misdirection mentioned above. In late 1986, an agency EEO counselor advised Petitioner to direct the Przecha matter to Office of Special Counsel "OSC" and MSPB for facilitating movement on the issue because the Respondents still insisted that no official copy of this declaration existed. The misdirections of denying the existence of the Przecha declaration and advising contact with OSC and MSPB are described respectively in c.c. App. p. 323-342 and p. 371-372.

(c) The Petitioner and his now deceased attorney-of-record were frivolous in pursuing the case through Federal district courts, thus warranting sanctions against them.

Respondents charged that sanctions were warranted because the Petitioner had a 24-year history of multiple complaints in multi-forums challenging "just one thing: Mr. Poll's removal for failure to report to work for 130 days" (c.c. App. p. 2, Respondents

Motion for San., p. 3, OJ p. 9). This 1982-1983 "failure to report" was never a matter of dispute in any forum. The record shows through Respondents' own submission (c.c. App. p. 72) that the parties stipulated that Poll did not report to duty in Fresno. Not reporting to Fresno was further noted with the EEO counselor's report (c.c. App. p. 366, last para). Petitioner's geographic immobility was a matter of common knowledge within the Agency through his refusals to accept promotions when offered to San Francisco, Washington D.C., and several points in between.

The importance of the Przecha evidence is detailed above in items A., B. and C. (1). The Petitioner disagreed with the district court's conclusion that the Przecha statement was just another piece of evidence (c.c. App. p. 442-445). There was nothing inappropriate or frivolous in this disagreement. The timeliness issue was also germane. The Petitioner disagreed with the lower court's conclusion that an EEO counselor was not timely contacted. There is nothing inappropriate or frivolous in this.

The circuit court was correct (c.c. OJ p. 8, para 2) in addressing the state of Petitioner's briefs filed with the circuit court. They were a clerical disaster. Petitioner had not seen the final copies until after the circuit court's decision. He was unaware of the proposed sanctions, and had not responded to them as the circuit court concluded (c.c. OJ p. 6, para 2). He had not talked with his attorney, due to the attorney's fragile health, since early 2007. After the attorney's

partner withdrew him from the case, the Petitioner learned of the proposed sanctions and the confusing state of the briefs. See Petition for Rehearing p. 12-13.

Petitioner's apologies to the circuit court for the clerical problems with the brief were offered with notification that his attorney had died. Petitioner explained that his attorney was not frivolous as suggested. He was instead impaired for an extended time by very serious then fatal illnesses. The attorney's arguments, however, were accurate. He was correct concerning the importance of the Przecha evidence and, that decades of delays in processing this evidence were caused by the Respondents' fraudulent claim that they had settled the Przecha evidence in 1987. Causing delays regarding a properly submitted EEO complaint could justify terminations for cause on a first offense in accord with IRM 6.751.1.16.2.

(d) "Petitioner and his attorney make much out of Respondent's concession at the district court hearing that, contrary to their earlier position, the Przecha matter had not been previously settled." The lower courts agreed, however, that Przecha's input was just "another piece of evidence" (c.c. OJ p. 7).

The lower courts were incorrect about Przecha, as shown above in items A., B. and C. (1), concerning regulated adverse-action procedures. They were also incorrect relating to the retaliation charges provided to Przecha as Petitioner's answer to this proposed

termination. Agencies are required by 5 C.F.R. § 752.404(f) to consider his answer. The answer invoked requirements in 29 C.F.R. § 1614.102-108 to treat the proposed termination within the framework of the open EEO complaint shown in c.c. App. p. 343-370.

Instead, the Director of the Fresno Service Center (Przecha's immediate superior) denied there was an oral-reply hearing; so no answer from Respondent was considered in any manner. The audio tape of this hearing disproves the Director's false report and serves as a basis for terminating him for cause in accord with provisions within IRM 6.751.1.16.2. See page 5, para 1, Petition for Rehearing.

The matters before the circuit court were not frivolous. A related district court case was not part of the record on this case; so the circuit court erred (c.c. OJ p. 9 footnote) in referring to it as frivolous based solely on the erroneous input of the Respondents cited above. Most of the errors cited here could have been resolved through a thorough review of the record before the circuit court. The rest reflect disputes of fact which the Petitioner contends would be settled in his favor through a full evidentiary hearing. He further contends that national interests were not served here or for any comparable cases by getting "rid" of them quickly through Summary Judgment; and disregarding serious charges of unlawful retaliations.

Petitioner's work and conduct were, per his appraisals, sufficiently exemplary that other managers came to Ogden from around the country to emulate his successes. There was no possible means to satisfy the prerequisite of 5 U.S.C. § 2302(b)(10). Contrary to the conclusions of the circuit court, all new supervisors in the agency are trained in accord with IRM 6.752.2 that the proposing official is the absolute gatekeeper regarding proposed adverse actions. If the retaliatory elements of the case could be extracted from it, there would have been no dispute and no convoluted history for this Court to address.

Retaliation is frequently subtle. It usually involves difficult evaluations of the motives behind adverse actions against individuals supposedly protected by Federal law from such retaliations. The Petitioner was branded as "anti-management" expressly because of one instance of representing an African-American with this gentleman's own EEO complaint and one other occasion of reporting high-level abuse of managerial power. This was fully documented in the OSC investigator's closeout (deferring to the open EEO complaint) and elsewhere in the original complaint. The GS-18 Regional Commissioner also agreed, as shown in the EEO counselor's report (c.c. App. p. 366-367) that the alleged "discord" he used as justification for Poll's reassignment to Fresno evolved directly from the "anti-management" sentiments referenced above. The Regional Commissioner refused to answer the EEO counselor's questions, as

shown in her report, about with whom the alleged "discord" allegedly occurred, and what work (if any) was adversely affected by this discord.

Branding a popular and respected manager (according to his appraisals) as anti-management specifically because of his involvement in two protected activities is undisputably retaliatory. This is particularly so as his responsibilities in representing the minority were not yet finalized when the geographic reassignment was ordered by the Regional Commissioner. Such overt retaliation carries a strong message for the workforce and the public; i.e., that Department of the Treasury retaliates and expects no repercussions for such misconduct.

In accord with 5 U.S.C. § 2302(b)(1)(A), (b)(8)(A)(i)(ii), (b)(9)(B), (b)(10) and (b)(12), those officials aware of the violations therein reflected are obligated to take or recommend correction of those violations. In accord with 29 C.F.R. § 1614.102(a)(6) those involved in such retaliations are mandated to be disciplined. In accord with IRM 751.1.16.2 the only discipline recommended is termination for cause for those involved on a first offense. No lesser form of discipline is even mentioned.

In spite of this, the retaliations here were not subtle. The Department of Treasury showed employees, who might consider reporting managerial misconduct or representing a minority, that involvement in such supposedly protected activities would be harshly treated. Without strong judicial oversight, the

top-level officials of the Department of the Treasury could retaliate basically "risk free." The Regional Commissioner (the alleged discriminating officer – ADO) and his subordinates controlled but misused both the adverse action and EEO complaint processes, particularly at the initial stages. See IRM 6.752.2.2, 5 C.F.R. § 752.404, and 29 C.F.R. § 1614.102-108. Rather than comply with their responsibilities for ensuring that those procedures were followed as designed, the Respondents abused their power to ensure the opposite outcome.

The current and prior two Secretaries of the Treasury were procedurally required to be named as Respondents in regard to Petitioner's charges of retaliation. Irrefutable facts place them in an unfavorable light (tolerating/condoning retaliations and then covering this up for decades) when they and the commissioner of the Internal Revenue Service were the only officials empowered organizationally to eradicate the retaliation at the sources and discipline the Regional Commissioner (and his subordinates) as required. Instead, the current secretary proposed sanctions against the Petitioner and his attorney (see Respondents' Motion for Sanctions) based on false accusations. See item C. (2)(c) above.

National interests to protect those who report gross mismanagement within Federal agencies, or represent minorities with valid EEO complaints, were not furthered by the lower courts in this case. The Respondents' actions and the lower courts decisions were again [as with bypassing adverse-action

procedures per C. (1) above] "out of line with the authorities" *Braen vs. Pfeifer Transportation Co.*, 361 U.S. 129, 130 (1959). Those decisions were also contrary to a prior decision of this Court as cited in item A and the decision of another circuit court as shown in item B. Accordingly, this Court could reverse summarily the decision of the circuit court as the results show it clearly failed to follow the authorities at issue.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

BRENT POLL
pro se

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

BRENT G. POLL,

Plaintiff-Appellant,

v.

HENRY M. PAULSON, JR., Secretary, United States Department of Treasury; PAUL H. O'NEIL, Former Secretary, United States Department of Treasury; OFFICE OF SPECIAL COUNSEL; OFFICE OF PERSONNEL MANAGEMENT; INTERNAL REVENUE SERVICE MERIT SYSTEMS PROTECTION BOARD; UNITED STATES EQUAL OPPORTUNITY COMMISSION; JAMES SCOTT, Chief of the File and Information Branch for OPM; RONNIE BLUMENTHAL, Director of the Office of Federal Operations for the EEOC; UNNAMED EEOC COMMISSIONERS; and JOHN DOES 1-5.

Defendants-Appellees.

No. 06-4177
(D.C. No. 1:01-CV-94-DB)
(D. Utah)

App. 2

ORDER AND JUDGMENT*

(Filed Oct. 18, 2007)

Before **HARTZ**, Circuit Judge, **BRORBY**, Senior Circuit Judge and **TYMKOVICH**, Circuit Judge.

Brent Poll appeals the district court's grant of summary judgment to defendants[1] on his claim of wrongful employment termination by the Internal Revenue Service (IRS). Having jurisdiction under 28 U.S.C. § 1291, we affirm.

I.

The parties are familiar with the facts. In sum, Mr. Poll was terminated from his employment with the IRS in 1983 after he refused to move from his job in Ogden, Utah, to a new post in Fresno, California. In contesting his termination, Mr. Poll alleged

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* After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist the determination of this appeal. *See* Fed. R. App. P. 34(a)(2); 10th Cir. R. 34.1(G). The case is therefore ordered submitted without oral argument. This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. It may be cited, however, for its persuasive value consistent with Fed. R. App. P. 32.1 and 10th Cir. R. 32.1.

[1] Pursuant to Fed. R. App. P. 43(c)(2), Henry M. Paulson, Jr., is substituted for John W. Snow as appellee in this appeal.

that the transfer was in retaliation for opposing the advancement of a supervisor in Ogden, defending an African-American fellow employee in a successful EEO action against the IRS, and filing several personal grievances with the IRS on his own behalf.

The parties are also familiar with the tortured and convoluted procedural history of Mr. Poll's efforts to obtain redress for what he believes to be a wrongful termination, and we will not detail that history here except as required for our analysis.

In 1983, shortly after his termination, Mr. Poll made a timely appeal to the Merit Systems Protection Board (MSPB). The MSPB upheld the termination, a decision that became final when Mr. Poll failed to file a timely petition for review under 5 U.S.C. § 7701(e)(1). In October 1984, the United States Court of Appeals for the Federal Circuit dismissed Mr. Poll's appeal for failure to prosecute in accordance with its rules.

At least by October 1985, Mr. Poll was in possession of a statement from Mr. Albert Prezcha [sic], his supervisor in Fresno, indicating that Mr. Poll was transferred in an effort to force him to resign. Aplt. App. at 327. More than a year later, Mr. Poll petitioned the MSPB to reopen and reconsider its earlier decision. *Id.* at 93. The MSPB declined to do so, citing its lack of authority to review the decision of the Federal Circuit. *Id.* at 377. Since that time, Mr. Poll has brought a number of administrative and court

actions in this matter, most of which were attempts to raise the Prezcha [sic] statement before a tribunal.

In 1998, fifteen years after his termination, Mr. Poll initiated another individual complaint of discrimination with the Department of the Treasury. Aplt. App. at 64. The agency's dismissal of the complaint was affirmed by the EEOC because the complaint "states the same claim that was pending before or decided by the agency or Commission." *Id.* at 132 n.1. That decision prompted Mr. Poll to file a complaint in federal district court. The district court's grant of summary judgment to defendants gave rise to this appeal.

II.

Our review of the district court's decision to grant summary judgment is de novo, and we apply the same Fed. R. Civ. P. 56 standard as did the district court. *Wells v. Shalala,* 228 F.3d 1137, 1140 (10th Cir. 2000). Thus, summary judgment for defendants was proper "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). "In reviewing the record, we view the evidence, and draw reasonable inferences therefrom, in the light most favorable to the nonmoving party." *Jones v. United Parcel Service, Inc.,* ___ F.3d

___, Nos. 06-3088 & 06-3095, 2007 WL 2677141 at *4 (10th Cir. Sept. 13, 2007).

Mr. Poll's case is a "mixed case" raising both termination and discrimination claims and was thus, initially, appealable to either the Federal Circuit or the appropriate federal district court. *Wells,* 228 F.3d at 1142-43. "The statutory scheme established by Congress for federal employees requires them either to combine their related employment discrimination and termination claims and pursue them in federal district court, or to appeal their termination claims to the Federal Circuit and waive any discrimination claims." *Chappell v. Chao,* 388 F.3d 1373, 1374 (11th Cir. 2004). Because Mr. Poll chose to appeal to the Federal Circuit after his initial adverse decision from the MSPB, he has effectively waived his right to continue advancing his discrimination claim in the district court. To the extent Mr. Poll argues only his termination claim, he is prohibited from proceeding with that claim now because the Federal Circuit has already entered a judgment on the merits against him.

In its order granting summary judgment, the district court explained all of this to Mr. Poll, holding that, by filing his original appeal in the Federal Circuit, Mr. Poll had effectively chosen his remedy and therefore did not have a jurisdictional basis for a later filing in the federal district court. Alternatively, the court held that the Civil Service Reform Act did not provide a jurisdictional basis for Mr. Poll's untimely discrimination claim, that the claim was

time-barred, and that res judicata precluded its relitigation. Mr. Poll's whistleblower claim failed because it was raised for the first time in the district court.

After our de novo review of the record, the relevant law, and the submissions of the parties, we affirm for substantially the reasons stated by the district court.

III.

We now turn to defendants' motion for sanctions pursuant to Fed. R. App. P. 38.

Rule 38 provides that, "[i]f a court of appeals determines that an appeal is frivolous, it may, after a separately filed motion or notice from the court and a reasonable opportunity to respond, award just damages and single or double costs to the appellee." "An appeal is frivolous when the result is obvious, or the appellant's arguments of error are wholly without merit." *Braley v. Campbell,* 832 F.2d 1504, 1510 (10th Cir. 1987) (en banc) (quotation omitted). Whether to impose Rule 38 sanctions is within this court's discretion, *Roth v. Green,* 466 F.3d 1179, 1188 (10th Cir. 2006), *petition for cert. filed,* 75 U.S.L.W. 3623 (U.S. May 9, 2007) (No. 06-1490), and attorneys can be sanctioned personally "for taking a truly frivolous appeal on behalf of their client," *Braley,* 832 F.2d at 1511. When an attorney's conduct "manifests either intentional or reckless disregard of [his or her] duties to the court," monetary sanctions in an amount equal

to the excess costs, expenses, or attorney's fees are properly levied. *Id.* at 1512.

Defendants' motion for sanctions against both Mr. Poll and his attorney is supported by a declaration signed by the Assistant United States Attorney of record in this case under the penalty of perjury indicating that defendants' expenses in this matter total $4,041.70. Mr. Poll and his attorney have responded to that motion, and defendants have replied.

In their response, Mr. Poll and his attorney continue to argue that the evidence of wrongful termination can be derived from the comments of a former supervisor, Albert Prezcha [sic], indicating that the IRS transferred Mr. Poll in an effort to terminate him. This evidence was not made available to Mr. Poll until after the Federal Circuit had dismissed his case. Nevertheless, the record demonstrates that Mr. Poll was in possession of the Prezcha [sic] evidence at least by October 1985. Aplt. App. at 327. Although in 1986, Mr. Poll did ask the MSPB to reopen and reconsider its 1984 decision, he does not dispute that he failed to prosecute the matter any further at that time. Instead, he chose to file a discrimination complaint thirteen years later and, eventually, to petition the federal district court for mandamus relief, neither course appropriate to achieving his ends.

Mr. Poll and his attorney also make much out of defendants' concession at the district court hearing that, contrary to their earlier position, the "Prezcha [sic] matter" had not been previously settled. We agree,

however, with the district court that the evidence supplied by Mr. Prezcha [sic] was simply that – a piece of evidence – and not the basis for bringing an entirely new proceeding, irrespective of whether it had been the subject of an earlier settlement agreement.

During the pendency of this litigation in the district court, defendants sent Mr. Poll's attorney a Rule 11 letter clearly identifying the deficiencies in his client's case. *See* Fed. R. Civ. P. 11. The Rule 11 letter specifically referred to the earlier denial of mandamus by the district court, *Poll v. United States Office of Special Counsel,* No. 1:93-CV-150-DAK (D. Utah June 19, 1998); Aplt. App. at 130, in which the court specifically held that it had no jurisdiction to overrule the earlier rulings of the MSPB and the Federal Circuit. That fact had no impact on Mr. Poll or his attorney. Indeed, at the time Mr. Poll and his attorney filed this appeal, the district court had already thoroughly and patiently explained why the case could not go forward, examining not just one basis for its decision but several alternative grounds as well. Nonetheless, Mr. Poll and his attorney proceeded to appeal although they established no basis for the district court's jurisdiction and presented no new arguments not already dispatched by the district court in its 1998 denial of mandamus.

Mr. Poll's briefs to this court, in and of themselves, could possibly be a basis for sanction. They are illogical, obfuscatory, and misleading. In an especially unhelpful usage, the briefs refer to both parties in this dispute as "appellants." Record cites in the

appellant's briefs do not consistently correspond to the record, causing an unnecessary waste of time and effort for defendants and this court. Under these circumstances, we hold that Mr. Poll's attorney has manifested either an intentional or, at the least, a reckless disregard of his duties to the court, *see Braley*, 832 F.2d at 1512, and that Mr. Poll has caused unnecessary expenditure of both the time and the resources of defendants and this court, *see Wood v. Santa Barbara Chamber of Commerce, Inc.*, 699 F.2d 484, 485 (9th Cir. 1983).[2] We therefore impose sanctions of $4,041.70 jointly and severally against both Mr. Poll and his attorney payable directly to defendants through their attorney of record in this appeal.

The judgment of the district court is AFFIRMED.

Entered for the Court

Timothy M. Tymkovich
Circuit Judge

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[2] Especially in reference to Mr. Poll, our decision to impose sanctions is reinforced by the fact that, acting pro se, he has filed yet another case in the federal district court raising the same issues he raises here. *See Poll v. Paulson*, No. 1:06-CV-144-TC-BCW (D. Utah filed Nov. 16, 2006). Given this, it is clear that Mr. Poll was not simply influenced by his attorney to pursue this appeal, but that he independently wishes to continue pursuing judicial proceedings despite past judicial rulings counseling against that course.

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF UTAH – NORTHERN DIVISION

BRENT G. POLL,

Plaintiff,

vs.

JOHN W. SNOW, Secretary, United States Department of Treasury, PAUL H. O'NEIL, former Secretary, United States Department of Treasury, OFFICE OF SPECIAL COUNSEL, OFFICE OF PERSONNEL MANAGEMENT, INTERNAL REVENUE SERVICE MERIT SYSTEMS PROTECTION BOARD, UNITED STATES EQUAL OPPORTUNITY COMMISSION, JAMES SCOTT, Chief of the File and Information Branch for OPM, RONNIE BLUMENTHAL, Director of the Office of Federal Operations for the EEOC, UNNAMED EEOC COMMISSIONERS, and JOHN DOES 1-5,

Defendants.

ORDER AND OPINION

Case No. 1:01-CV-94

Judge Dee Benson

(Filed Jun. 22, 2006)

I. INTRODUCTION

This is a case that involves an IRS agent, Mr. Poll, who was first transferred from Ogden, Utah to Fresno, California and then terminated when he refused to report to his new area. Mr. Poll claims that the IRS wrongfully terminated him in retaliation for (1) not supporting the advancement of his supervisor in Ogden, (2) defending an African-American fellow employee in his successful EEOC complaint against the IRS, and (3) filing several grievances against his Ogden supervisors concerning his own employment with the IRS. Mr. Poll brings this action as a "mixed case" where he claims protection under both 5 U.S.C. section 2302(b) and the retaliation definition for protected activities found in the Civil Rights Act.

Twenty three years ago, Mr. Poll was employed as an IRS agent. Mr. Poll was reassigned from Fresno, California to Ogden, Utah after experiencing difficulties with his superiors in the Ogden office. He was reassigned from his position as GS-12 Disclosure Specialist to the position of GS-12 Program Analyst. After extending his reporting date twice, the IRS directed Mr. Poll to report for duty at the Fresno office on January 10, 1983. Mr. Poll did not report and was absent from work until May 20, 1983. Eventually, the IRS proposed to remove Mr. Poll for his failure to report, and he was terminated.

II. BACKGROUND

The following is a general description of the vast procedural history in this matter. Mr. Poll appealed his removal to the Merit Systems Protection Board ("MSPB"), and the Board upheld his removal. The MSPB found "nothing inappropriate about management's decision to reassign a professionally competent but troublesome employee to another geographic location in an effort to deal with the intense distrust and dislike between appellant and upper management."[1] The decision became final because Mr. Poll did not file a petition for review with the MSPB as required under 5 U.S.C. section 7701(e)(1). Later, Mr. Poll attempted to appeal the MSPB's final decision to the United State Court of Appeals for the Federal Circuit, but the court dismissed his appeal for failure to prosecute in accordance with its rules.

Mr. Poll sought to reopen/reconsider his removal with the MSPB after discovering new evidence from his supervisor in Fresno, Albert Przecha. The new evidence was a writing by Mr. Przecha stating that Mr. Poll was transferred "for the express purpose of firing him from his job."[2] The MSPB denied Mr. Poll's petition because its regulations did not give him the right to request reconsideration more than 35 days

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[1] Exhibit 1 to Memorandum in support of Defendants' Motion for Summary Judgment.

[2] Exhibit 2 to Memorandum in support of Defendants' Motion for Summary Judgment.

after the issuance of the Board's decision.[3] Further, the Board noted that Mr. Poll could find recourse in the Federal court system. Mr. Poll, however, had already unsuccessfully appealed the MSPB decision to the Federal Circuit Court, and the Board lacked the authority to review that decision.

In 1985, in hope of obtaining some relief, Mr. Poll filed two equal employment opportunity ("EEO") complaints against the IRS. The complaints dealt with a delay in his hiring to a new, government position based on misrepresentations of Mr. Poll's work and character made by an Ogden supervisor. Mr. Poll settled both of those complaints with the IRS in 1987. The parties entered into a settlement agreement providing that the settlement "shall constitute a full and complete settlement of any and all claims which the complainant may have against the agency, present and former agency employees or agents, and/or the United States of America as a result of the incidents or circumstances raised in the above-referenced complaints." The defendants do not argue that the settlement agreement pertained to Mr. Poll's claims based on the Przecha statement.

In 1993, Mr. Poll filed in U.S. District Court for the District of Utah a petition for writ of mandamus directing the Office of Special Counsel ("OSC") to intervene and investigate his allegations against his reassignment and removal by the IRS. Mr. Poll cited

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[3] 5 C.F.R. § 1201.113.

to the Przecha statement to show that his termination was improper. This Court granted the federal defendants' motion to dismiss on the basis that it did not have jurisdiction to overrule the existing judgments of the MSPB and the Federal Circuit and that it could not amend the OSC's exercise of prosecutorial discretion through a writ of mandamus.

Before the court's dismissal of the his complaint, Mr. Poll contacted an EEO counselor and filed his third EEO complaint challenging his reassignment. The Department of Treasury dismissed the complaint. The Treasury ruled against Mr. Poll on several grounds including: his complaint raised a matter that was the basis of the 1984 MSPB appeal, the complaint raised a matter that was the basis of the 1995 District Court action, and Mr. Poll's initial contact with an EEO Counselor was not timely. Mr. Poll appealed the Treasury dismissal to the EEO Commission, Office of Federal Operations ("OFO"). Mr. Poll argued that the Przecha statement constituted "new and material evidence" and the matter was not resolved through his 1985 EEOC complaints. The OFO upheld the Treasury dismissal of Mr. Poll's complaint because it "state[d] the same claim that was pending before or decided by the agency or Commission." Mr. Poll, however, has seized upon the language in the EEOC's dismissal where the decision gave Mr. Poll the "right to appeal that decision by filing a civil action in the appropriate United States District Court."

On August 8, 2001, Mr. Poll filed this action. On or about April 9, 2002, Mr. Poll served the complaint on the defendants, although he did not properly serve the United States Attorney's Office. Mr. Poll took several more years in amending his complaint and adding defendants. Mr. Poll ultimately stated the following four causes of action:

> (1) reassignment amounted to a pretextual termination by the IRS,
>
> (2) defendants took the challenged actions as "reprisal" against him for representing Mr. Groves and challenging his supervisors,
>
> (3) retaliation for conduct protected by the Whistleblower Protection Act of 1989, and
>
> (4) that the OPM, OSC, MSPB, and EEOC were required to act in his best interest and "correct what was clearly a wrongful act."

III. DISCUSSION

If Mr. Poll is to be believed, one must accept that he has been the most unfortunate victim of repeated, procedural defects in the United States' judicial system. Beyond that, there are several hurdles that Mr. Poll cannot overcome in asserting his causes of action.

1. Sovereign Immunity

Mr. Poll argues that the EEOC's decision in 2001 allowing him the "right to file a civil action in an

appropriate United States District Court" constitutes a waiver of the United States' sovereign immunity. But the EEOC decision is merely standard, bureaucratic form language to inform Mr. Poll of the right to seek judicial review of the EEOC's decision. Mr. Poll's right to seek judicial review is subject to all available legal defenses, including the requirement that an employee timely exhaust his administrative remedies. *See Horton v. Potter,* 369 F.3d 906, 910 (6th Cir. 2004) ("Timely contact with an EEO counselor is an administrative remedy that a federal employee must invoke before he may bring a claim of employment discrimination in federal district court."). Mr. Poll claims he came across the incriminating evidence, Mr. Przecha's statement, in 1984. Yet he failed to notify an EEO counselor until August 19, 1998, almost 15 years after its discovery.

Further, Mr. Poll claims that the Civil Service Reform Act of 1978 ("CSRA"), codified in various sections of 5 U.S.C., provides a jurisdictional basis for his claim. The relevant provisions are 5 U.S.C. sections 7702-03, which provide that an employee can seek judicial review of an MSPB decision either by filing a petition for review with the Federal Circuit (for non-mixed cases) or by filing an action in district court (for mixed cases). The Tenth Circuit holds that employees may not pursue both avenues. *Wells .v Shalala,* 228 F.3d 1137, 1143 (10th Cir. 2000).

Mr. Poll sought relief for his "mixed case," an EEO claim, with the MSPB on three separate occasions and elected to appeal the MSPB's decision on

the merits of his claim to the Federal Circuit. Under section 7702, Mr. Poll chose one avenue for relief and, therefore, he does not have a jurisdictional basis for bringing his claims to this Court 5 U.S.C. § 7702(e)(1)(A); *Wells,* 228 F.3d at 1143. Not only do the statutes and common law preclude his claim on a jurisdictional basis, but also this Court previously ruled against Mr. Poll on this very issue in *Poll v. United States Office of Special Counsel,* Case No. 1:93 CV 150 DAK, Doc. No. 28. Therefore, Mr. Poll should not be permitted to relitigate the jurisdictional basis for his claims. Mr. Poll's complaint should be dismissed with prejudice.

2. Civil Service Reform Act as Basis for Mr. Poll's Claims

As discussed above, the CSRA provides a federal employee two avenues to pursue an administrative review of a personnel decision. In a "mixed case," the employee may file a complaint with the MSPB or with the employing agency's EEO office, but not both. *Wells,* 228 F.3d at 1143. If the employee seeks relief through an EEO mixed case complaint, he can file a civil discrimination action in district court within 30 days of a final decision by the agency or after 120 days have passed without a decision. 5 U.S.C. § 7702(e)(1)(A). Mr. Poll previously chose to pursue his claims through the MSBP process and the Federal Circuit. Therefore, Mr. Poll is not permitted to seek another review opportunity by filing a new discrimination complaint with the agency, appealing its

dismissal to the EEOC, and then filing a civil action in district court. *Id.*; *Wells,* 228 F.3d at 1143.

Even if Mr. Poll did not foreclose his right to bring a civil discrimination action by choosing to file a MSPB complaint, he should not be allowed another review opportunity where he did not take action within the time frame required under the statutory scheme. An employee who claims discrimination or retaliation by a federal agency "must initiate contact with an [EEO] Counselor within 45 days of the date of the matter alleged to be discriminatory." 29 C.F.R. § 1614.105(a)(1). Here, Mr. Poll was aware of Przecha's statement in 1984; however, Mr. Poll did not make an EEO counselor aware of this until August 1998. So Mr. Poll does not have a basis under the CSRA for his claim where he did not properly contact an EEO counselor or take any action for 14 years.

Furthermore, Mr. Poll did not raise his whistleblower complaint in his first MSPB appeal in 1983 or in any of his EEOC complaints. And Mr. Poll does not make a showing of why he failed to allege the whistleblower claim until this action. Mr. Poll has filed nine complaints or appeals regarding his removal with four different forums over the past two decades and has not raised the whistleblower claim until now. He did not avail himself of administrative remedies where he did not file his EEO complaint with an EEO counselor within 45 days of the alleged retaliatory event. His whistleblower claim should be dismissed for failure to timely exhaust the claim and should not provide a jurisdictional basis for his claim. Even if

Mr. Poll timely brought his whistleblower claim, he has not shown any evidence that he is entitled to relief for his claim.

3. Limitations Period and Res Judicata

Mr. Poll's claims are time barred because in his "mixed case" he was required to file an action within 30 days after receipt of notice of the MSPB's final decision.[4] The MSPB reached its decision in 1984; however, Mr. Poll waited until 2001 before filing this action. Mr. Poll argues his claim is not time barred because the delay in this case was due to Defendants' "inexcusable conduct."[5] Mr. Poll is in essence arguing for an equitable tolling of the limitation period, but this argument is without merit.

"[A] Title VII time limit will be tolled only if there has been 'active deception' of the claimant regarding procedural prerequisites." *Scheerer v. Rose State College*, 950 F.2d 661, 665 (10th Cir.) (emphasis in original) (citation omitted). Equitable tolling may also apply "if a plaintiff is actively misled, or has in some extraordinary way been prevented from asserting his or her rights." *Martinez v. Orr*, 738 F.2d 1107, 1110 (10th Cir. 1984) (quotations and citation omitted).

Mr. Poll claims that the delay in pursuing his claims came about because the government failed to

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[4] 5 U.S.C. § 7703(b)(2).

[5] Plaintiff's Memorandum at 18.

contact Mr. Przecha regarding his statement.[6] It is not apparent, however, how the alleged government inaction impeded or deceived Mr. Poll into allowing 14 years of deadline after deadline to pass. Again, Mr. Poll knew about the Przecha statement in 1984 but did not timely take the necessary steps to pursue his claim.

Moreover, "[u]nder res judicata, or claim preclusion, a final judgment on the merits of an action precludes the parties or their privies from relitigating issues that were or *could have been raised* in the prior action." *Wilkes v. Wyoming Dept. of Empl. Div. of Labor Standards,* 314 F.3d 501, 503-04 (10th Cir. 2002) (quoting *Satsky v. Paramount Comm., Inc.,* 7 F.3d 1464, 1467 (10th Cir. 1993)). In order for res judicata to apply there must be present: (1) a final judgment on the merits in the prior action, (2) identity of parties or privies, and (3) identity of the cause of action. *Id.* at 504. Mr. Poll claims that res judicata is inapplicable here because (1) there has been no final determination on Plaintiff's mixed case in any setting, and (2) the Federal Circuit's final judgment on the merits of his claim preceded the discovery of the Przecha statement.[7]

Mr. Poll's first contention is incorrect where both the MSPB and the Federal Circuit made final determinations on his case. Mr. Poll appealed the MSPB's

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[6] *Id.* at 18-19.

[7] *Id.* at 18.

decision, which addressed his claims of pretextual termination, reprisal for his EEO activities, and the failure to correct a wrongful act. The MSPB did not review the original finding because their regulations did not give Mr. Poll the right to request reconsideration, and the MSPB has no authority to review a decision of the Federal Circuit. Also, the Federal Circuit's dismissal of Mr. Poll's removal claim based upon his failure to prosecute constitutes a judgment on the merits for purposes of claim preclusion. *See Plaust v. Spendthrift Farm, Inc.*, 514 U.S. 211, 218 (1995) ("The rules of finality, both statutory and judge made, treat a dismissal on statute-of-limitations grounds the same way they treat a dismissal for failure to state a claim, for failure to prove substantive liability, or for failure to prosecute as a judgment on the merits.").

Even if this Court were to find that there had not been a final determination of Mr. Poll's claims, his claims are not valid where he failed to raise these issues in prior proceedings. The doctrine of res judicata preludes parties or their successors in interest from relitigating issues that were or *could have been raised* in the prior action after a final judgment on the merits. *Wilkes*, 314 F.3d at 503-04 (quoting *Satsky v. Paramount Comm., Inc.*, 7 F.3d 1464, 1467 (10th Cir. 1993)). Mr. Poll could have raised the Przecha comments much earlier in objecting to the multiple, prior rulings against him. Also, Mr. Poll could have sought a rehearing before the Federal Circuit and/or the MSPB if in fact those forums decided his case

before the discovery of the Przecha statement. Mr. Poll did not avail himself of these remedies and should not be allowed to pursue remedies in this action.

IV. CONCLUSION

For the foregoing reasons, Defendants' motion for summary judgment is GRANTED.

IT IS SO ORDERED.

DATED this 21st day of June, 2006.

/s/ Dee Benson
Dee Benson
United States District
Judge

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

BRENT G. POLL, Plaintiff-Appellant, v. HENRY M. PAULSON, JR., Secretary, United States Department of Treasury, et al., Defendants-Appellees.	No. 06-4177

ORDER

(Filed Jan. 14, 2008)

Before **HARTZ**, Circuit Judge, **BRORBY**, Senior Circuit Judge and **TYMKOVICH**, Circuit Judge.

Appellant's petition for rehearing is denied.

The petition for rehearing en banc was transmitted to all of the judges of the court who are in regular active service. As no member of the panel and no judge in regular active service on the court requested that the court be polled, that petition is also denied.

Entered for the Court

/s/ Elisabeth A. Shumaker
ELISABETH A. SHUMAKER,
Clerk

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(2)

No. 07-1297

Supreme Court, U.S.
FILED
JUN 13 2008
OFFICE OF THE CLERK

In The

Supreme Court of the United States

BRENT POLL,

Petitioner,

vs.

HENRY M. PAULSON, JR., Secretary,
United States Department of Treasury, et al.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

PETITION FOR REHEARING

BRENT POLL
7605 South 1375 East
South Weber, Utah 84405
(801) 479-3786
pro se
(Attorney of record died 11-12-07)

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PETITION FOR REHEARING 1

I. This Court's opinions of 27 May 2008 on *Gomez-Perez v. Potter* (case #06-1321) and *CBOCS West, Inc. v. Humphries* (case #06-1431) allow retaliation-related lawsuits, including those premised on conduct-based discrimination, to move forward so injured parties can recover damages. Petitioner's case is a discrimination/retaliation-based lawsuit. The same arguments and opinions voiced by the majority on those cases are applicable to the petitioner's case 1

II. On 8 January 2008, the Tenth Circuit's decision on case #06-4177 (Supreme Court case #07-1297) was applied as "relevant case law" to decide Utah District Court case #1:06-CV-00144TC. This goes "beyond the academic or episodic" degree of importance and greatly expands the potential adverse-impact of the error by the Tenth Circuit; i.e., its finding that the Agency's proposing official/oral-reply officer offered nothing more than "simply that . . . a piece of evidence – and not the basis for bringing an entirely new proceeding." Usage of this erroneous finding as relevant case law assures that it will "have continuing future consequences" 4

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III. After the decision by this Court on case #07-1297, the respondents pressed for sanctions imposed by the Tenth Circuit Court. Payment of $4048.58 was made by the petitioner on 2 June 2008 to avoid further charges. Sanctions would not have been imposed if the Tenth Circuit Court had given due credence to the importance of the proposing official/oral-reply officer (the Przecha evidence), or been privileged to the new opinions cited above, rendered by this Court on 27 May 2008 7

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PETITION FOR REHEARING

The petitioner respectfully moves this Court for an order (1) vacating its denial of the petition for a Writ of Certiorari (entered on 19 May 2008) and granting the petition; or as an alternative (2) vacating its denial of the Petition, granting the petition and remanding the matter to the Tenth Circuit with instructions for proceedings consistent with the importance of evidence provided by the agency's designated proposing official/oral-reply officer as emphasized in the initial petition to this Court and with recent decisions by this Court regarding retaliation-related lawsuits. Intervening events and grounds for this motion are as follows:

I. This Court's opinions of 27 May 2008 on *Gomez-Perez v. Potter* (case #06-1321) and *CBOCS West, Inc. v. Humphries* (case #06-1431) allow retaliation-related lawsuits, including those premised on conduct-based discrimination, to move forward so injured parties can recover damages. Petitioner's case is a discrimination/retaliation-based lawsuit. The same arguments and opinions voiced by the majority on those cases are applicable to the petitioner's case.

Although in dissent, Justice Thomas provided an example of retaliation which equates closely with the petitioner's case. The Justice asked, "consider, for example, any employer who fires any employee who complains of race discrimination, regardless of the

employee's race. Such an employer is undoubtedly guilty of retaliation."[1] In case #07-1297, Przecha's evidence states that the petitioner "was reassigned from Ogden to Fresno for the express purpose of firing him."[2] This was concurrent with the petitioner being labeled as "anti-management" for reporting gross mismanagement and representing an African-American with that gentleman's own EEO complaint.[3]

Also in dissent, Chief Justice Roberts stated that "Congress has always protected federal employees from retaliation through the established Civil Service process."[4] The Chief Justice supported this statement by citing 5 U.S.C. § 2302(b)(9) which "plainly applies to retaliation for exercising rights under the civil rights statutes."[5] Petitioner too argued[6] that the respondents were obligated under this statue to voluntarily correct the wrongful reassignment/wrongful termination proven in Przecha's declaration, but they failed to do so.

If top-level officials in federal agencies are brazen enough to retaliate, or tolerate retaliation, one should

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[1] See ***CBOCS West, Inc. v. Humphries***, case #06-1431, dissent p. 4.

[2] See Supreme Court case #07-1297, p. 5.

[3] See Supreme Court case #07-1297, p. 17.

[4] See ***Gomez-Perez v. Potter***, Supreme Court case #06-1321, dissent p. 1.

[5] See *Gomez-Perez v. Potter*, Supreme Court case #06-1321, dissent p. 13.

[6] See Supreme Court #07-1297, p. 18.

expect them to be bold enough to coverup their misconduct and compromise the administrative processes under their jurisdiction that are meant to enforce the retaliation-related laws and regulations at issue.

The respondents unilaterally closed petitioner's open EEO complaint and directed him, against his wishes, to the Merit Systems Protection Board (MSPB).[7] They then successfully argued to the MSPB that the petitioner should not be afforded the time to hire an attorney familiar with MSPB proceedings or conduct discovery before the hearing. Although so unfairly handicapped, the respondents case-in-chief was dismissed by the administrative law judge as being predicated upon "hearsay upon double-hearsay."[8] However, she allowed supposed rebuttal testimony from Mr. Bevan Higbee, which if true, could have served as a basis for discipline in Ogden, but not a reassignment to Fresno. Mr. Higbee's input, however, when repeated later was challenged and dismissed in a 1987 settlement agreement as being without a factual basis.[9]

While contrary to the requirements of 5 U.S.C. § 2302(b)(9), as Chief Justice Roberts expected them to be applied to "protect" federal employees, and 29 C.F.R. § 1614.102(a)(2)(3)(6); the respondents were not held accountable for their manipulation of the administrative processes under their control. If

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[7] See Supreme Court case #07-1297, p. 13.

[8] See Tenth Circuit Court case #06-4177, App. 75.

[9] See Tenth Circuit Court case #06-4177, respondents' exhibit 'D', item #3, App. 54, 55.

Przecha had not provided his authoritative input (about nine months after the MSPB decision) to prove this manipulation and provide the basis for a new proceeding, the petitioner would have been deprived of due process and the retaliations by respondents would be forgotten.

II. On 8 January 2008, the Tenth Circuit's decision on case #06-4177 (Supreme Court case #07-1297) was applied as "relevant case law" to decide Utah District Court case #1:06-CV-00144TC.[10] This goes "beyond the academic or episodic"[11] degree of importance and greatly expands the potential adverse-impact of the error by the Tenth Circuit; i.e., its finding that the Agency's proposing official/oral-reply officer offered nothing more than "simply that . . . a piece of evidence – and not the basis for bringing an entirely new proceeding."[12] Usage of this erroneous finding as relevant case law assures that it will "have continuing future consequences."[13]

As with the Tenth Circuit case #06-4177, District Court case #1:06-CV-00144TC was an entirely new

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[10] See ***Poll v. Paulson***, Utah District Court case #1:06-CV-00144TC.

[11] ***Rice v. Sioux City Cemetery***, 349 U.S. 70, 74 (1955).

[12] See Supreme Court case #07-1297, App. 8, first para.

[13] Justice Harlan, some aspects of the Judicial Process of the Supreme Court of the United States, 33 AUSTL L.J. 108 (1959).

proceeding predicated on the 'new' August 1984 evidence provided by Albert Przecha (the Agency's designated proposing official/oral-reply officer). The first case, as reflected in the Petition for a Writ of Certiorari, addressed the petitioner's wrongful termination and violations of adverse-action laws and regulations. The second alleged suppression of a properly filed EEO complaint. As outlined in guidelines from the Equal Employment Opportunity Commission, undue delays in processing an EEO complaint represent a separate form of retaliation. The second case involved different time frames, different violators and violations of different Federal regulations.

The following is a brief overview of the coverups which necessitated Utah District Court case #1:06-CV-00144TC:

The respondents claimed in 2005 that they had specifically settled the Przecha evidence in 1987 as EEO retaliation complaint #TD 85-2512. They withdrew this false claim after evidence was provided by the petitioner refuting it. Between 1987 and 2005, the respondents falsely claimed that they had settled the Przecha evidence with a 1987 settlement agreement but no specifics were offered and the settlement never mentioned Przecha. Between 1985 and 1987 the respondents falsely claimed (through interaction with OPM/NACI), that the Przecha evidence did not exist in an official form. After two years, the tangible evidence was finally provided. Those misrepresentations injured the petitioner as cited in the complaint.

Each misrepresentation also should have served as the basis for discipline against the perpetrators as required by 29 C.F.R. § 1614.102(a)(6) and IRM 6.751.1.16.2.

While the two retaliation cases were related but separate as described above and throughout the text of the respective cases,[14] both were premised on the importance of the Przecha evidence. The error by the Tenth Circuit Court on the first case, which dismissed the input of the proposing official/oral-reply officer as "simply" another piece of evidence, was repeated on the second. As the higher court's decision was treated as "relevant case law," the importance of the regulatory role of the proposing officials/oral-reply officers was greatly diminished in the Tenth Circuit from that defined in the plain language of the controlling regulations[15] and the importance of oral-reply officers (including the answers provided to them) as shown in another Federal circuit.[16]

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[14] While different, common elements involving both cases suggested merging them for judicial economy. This was proposed within the text of the second case.

[15] See IRM 6.752.2 and 5 C.F.R. § 752.403-404.

[16] See ***Loui v. Merit Systems Protection Board***, 25 F.3d 1011 (C.A. Fed. 1994).

III. After the decision by this Court on case #07-1297, the respondents pressed for sanctions imposed by the Tenth Circuit Court.[17] Payment of $4048.58 was made by the petitioner on 2 June 2008 to avoid further charges. Sanctions would not have been imposed if the Tenth Circuit Court had given due credence to the importance of the proposing official/oral-reply officer (the Przecha evidence), or been privileged to the new opinions cited above, rendered by this Court on 27 May 2008.

The Tenth Circuit Court was incorrect in stating that the petitioner had not established a basis for the District Court's jurisdiction, and had presented "no new arguments not already dispatched by the District Court in its 1998 denial of mandamus."[18] The respondents' own submission showed the District Court's ruling in this instance did not prohibit "plaintiff from seeking redress (regarding the Przecha evidence) from the Merit Systems Protection Board and/or the Equal Employment Opportunity Commission."[19] The petitioner acknowledged this decision by the Court, and "the right to restart the new Przecha evidence through the EEO appeal process."[20] This restart was shown in respondents' submission to the Tenth

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[17] See Supreme Court case #07-1297, App. 9.

[18] See Supreme Court case #07-1297, App. 8.

[19] See Tenth Circuit Court #06-4177, App. 130.

[20] See Tenth Circuit Court #06-4177, App. 180.

Circuit Court.[21] As the new 1984 Przecha evidence was appropriately reactivated through agency EEO complaint processes, the Tenth Circuit Court's finding that it was "simply" just another piece of evidence and not sufficient to warrant an "entirely new proceeding" became the focus of the appeal to this Court.

While petitioner understands that "writs of certiorari are matters of grace" and "may not involve considerations of the merits,"[22] he contends the supervisory powers of this Court need to be exercised when a circuit court compounds its erroneous interpretation of agency and federal regulations (i.e., the importance of the role and evidence provided by proposing officials/oral-reply officers) through imposition of sanctions against petitioners who attempt to have those regulations enforced in accord with the plain language in which they are written. Reticence in exercising such supervisory discretion in such cases, constitutes a "serious hindrance to effective administration"[23] of the involved federal statutes and agency regulations. This is particularly so when other courts in the Tenth Circuit are already embracing the erroneous interpretation as relevant case law.

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[21] See Tenth Circuit Court #06-4177, App. 58 lines 18-23.

[22] See ***Wade v. Mayo***, 334 U.S. 672, 680 (1948).

[23] See ***Rothensies v. Electric Battery Co.***, 329 U.S. 296 (1946).

CONCLUSION

For the above reasons, as well as those contained in the petition for writ of certiorari, the petition for rehearing should be granted, the petition for writ should be granted and petitioner respectfully requests this Honorable Court to issue a writ of certiorari to the United States Court of Appeals for the Tenth Circuit. Alternatively, petitioner respectfully requests that the petition for rehearing be granted, the petition for writ of certiorari be granted and that this Court remand this matter for further proceedings consistent with its recent opinions cited in item (I) above.

Respectfully submitted,

BRENT POLL, pro se

CERTIFICATE OF COUNSEL

I hereby certify that this Petition for Rehearing is submitted in good faith and not for delay. This Petition for Rehearing is restricted to the grounds set out in Rule 44.2.

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BRENT POLL,
pro se